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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 307

ROSE H. BENCEL, Administratrix and Administratrix *ad Prosequendum* of the Estate of THOMAS JOSEPH BENCEL, deceased, *et al.*,
Petitioners,

vs.

WILLIAM FROST and MRS. MICHAEL J. SIMSON, Administratrix and Legal Representative of the Estate of CAPTAIN MICHAEL J. SIMSON, deceased,
Respondents.

IN THE MATTER OF THE PETITION

of

MRS. MICHAEL J. SIMSON, Administratrix and Legal Representative of the Estate of CAPTAIN MICHAEL J. SIMSON, Deceased, Owner of the Motor Boat "ONE MORE", for Exoneration from or Limitation of Liability,
Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

Petition, page 2, and appendices A and B thereto properly set forth the same.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

1. Does not the mysterious loss of a vessel at sea without a legally adequate explanation as to the cause of the loss by the libellants require a judgment in favor of the respondents?

2. Have not the limits of the doctrine of seaworthiness heretofore been set by this court?

3. Is not one seeking *Certiorari* on a question involving the application of the doctrine of *res ipsa loquitur* in an Admiralty action, where the trial judge sits as both the finder of the fact and trier of the law, essentially raising mixed questions of fact and law and concerning the weight of the evidence, which this court has enunciated in the past as being questions that cannot be properly certified to this court?

4. Does not one seeking *Certiorari* have to demonstrate either a "substantial federal question" or a "conflict of decisions below"?

Statute Involved

The Petition adequately sets forth the statute involved.

Statement of the Case

The appeal below was from a judgment rendered by a judge sitting in Admiralty without a jury (R. 63). The facts leading to this determination follow.

On July 19, 1961, Michael J. Simson, deceased, was the owner of a 26'7" wooden hull enclosed Chris Craft cruiser, built in 1951, and propelled by twin 95 h.p. inboard gaso-

line engines. This boat was fitted with a small cabin, raised wheel stand and after cockpit (R. 87; 127; 128; 175; Exh. L-3). There were two wooden bulkheads, one immediately forward of the engine compartment and another about 15 feet further forward and about 20 inches from the bow (R. 84; 139). Over the engine compartment was a wooden hatch that served as part of the deck (R. 179). To the rear of the engine compartment, at a point under a seat in the rear of the boat, was a 60 gallon Monel gas tank (R. 139; 140). A fuel line came off the top of the gas tank, which then bisected; each section running to the fuel pump of each engine (R. 314; 403).

The boat was purchased in 1958 from one Salvatore Liccardi, the original owner (R. 294). Liccardi had used the boat very rarely during the time he owned it, and this was the reason he sold the boat (R. 297). At the time of sale the boat was in "A-1" condition (R. 297). It was so maintained thereafter (R. 149).

In the fall of 1960 "Captain" Simson had his boat, named the "One More", brought to Hoffman's Anchorage, located in Brielle, New Jersey, for winter storage (R. 88; 104). It was then hauled out of the water by means of a marine railway by Harold Hoffman, Sr., owner of the business, his son, Harold Hoffman, Jr., the Dockmaster, and Edward Mayer, another employee, and then braced and blocked so that the hull rested about 3 feet off the ground (R. 104; 105). The hull was then scrubbed, and found to be sound (R. 105; 106; 211). The starboard engine was thereafter winterized by Harold Hoffman, Jr., who at the time found the interior condition of the boat to be clean and good (R. 106). The port engine was subsequently removed by one Jere Kell, a marine engine mechanic, and was rebuilt (R. 106; 312). He had rebuilt the port engine the year previous (R. 312).

In the spring of 1961 the hull was painted, the rebuilt engine reinstalled and the boat returned to the water in late May or early June to a mooring at Hoffman's Anchorage (R. 92; 107; 213). At that time the hull was in good condition (R. 107; 311). Kell then tested the boat, synchronized the engines and found that both the engines were in operating order, and the hull seemed satisfactory (R. 213; 313). At about the same time, Harold Hoffman, Sr., made an inspection of the boat at Simson's request for the purposes of appraisal (R. 213; 214). He considered the boat to be in better condition than it had been in the fall, because it had been checked and painted (R. 211; 214; 215). The motors and bilges were clean (R. 215). From the time the boat entered the water until its loss, neither he nor his son heard of any complaints regarding the operation of the vessel (R. 90; 215).

The boat was equipped with 10 adult and 3 children's life preservers, a radio, 4 fire extinguishers placed from fore to aft, running lights, 1 horn and 1, or possibly 2, bilge pumps (R. 91; 92; 109; 110; 300; 302; 305; 306). In addition, it had a back flame arrester, bilge ventilators, 2 life rings, a compass and navigational charts (R. 146-148).

After its return to the water, the boat passed the Coast Guard Auxiliary voluntary inspection, and a sticker signifying such was placed on the boat (R. 148).

As to Michael Simson, the owner, he was unquestionably well qualified to operate the boat, having had 10 to 12 years' experience operating both outboard and inboard boats (R. 123; 299). He had, in fact, built a 16′ Chris Craft from a kit, which he operated for two years (R. 299). One individual who had observed Michael Simson operate the "One More" considered his level of proficiency to be slightly less than a professional captain. Another stated that he operated the boat "exceptionally well" (R. 153;

216). They also observed that he followed the standard procedure of opening the engine hatches to ventilate the bilge and engine compartment prior to starting the engines (R. 151; 307; 355).

It is with the knowledge of this background of the boat, its equipment and the experience of its owner, that we turn to the events that led to its loss and the loss of Michael Simson and his five companions.

On July 18th, Michael Simson, who was the owner of a floor covering business in Denville, N. J., invited 5 friends, the petitioners, to go fishing with him from Hoffman's Anchorage, Brielle, New Jersey, early the following morning. It was their intention to fish for tuna (R. 114; 120; 205; 206; 222; 223). The 6 men arrived at the Anchorage from Denville on the evening of the 18th (R. 52; 206). Upon his arrival, Simson happened to meet one Raymond Caire, the owner of the "Fin Fun II", a boat berthed at the Anchorage a short distance from the "One More" (R. 221; 222). The two men discussed what they had heard as to where the tuna were biting, and they decided to go to Barnegat Ridge 16½ miles directly off Barnegat Light the next morning (R. 205; 223). It was also agreed, either at that time or the next morning, that radio communication would be had between the two boats at quarter past each hour (R. 235).

The following morning at about 5:00 A.M., the trip commenced after a successful radio check was had between the two boats (R. 226; 227). The "One More" departed first to be followed within 5 to 10 minutes by the "Fin Fun II" (R. 227).

The weather conditions on the day in question were good. The seas were calm. Visibility varied between 1 and 5 miles because of haze (R. 228).

After a run of approximately an hour and 45 minutes, on a course 135° from Manasquan Inlet, the two boats came abreast at a distsance of between 100 and 300 feet with the "Fin Fun II" to the port side of the "One More" (R. 229; 236). Radio communication was again had between the two boats (R. 231; 232; 237). At this time the "One More" was cruising at what Raymond Caire assumed to be 10 to 12 knots, while the "Fin Fun II" was going almost 15 knots and was thus pulling away from the "One More" (R. 230; 231). This was the last time there was any visual or radio contact between the two boats (R. 233). Futile attempts were made by Caire on two or three other occasions to contact the "One More" by radio (R. 237; 238).

When the "One More" failed to return to Hoffman's Anchorage that evening, apprehension mounted. An extensive Coast Guard search was commenced the following day, utilizing Naval ships and aircraft that happened to be in the area, that continued for 10 days and covered some 78,000 square miles from Block Island to the Maryland-Delaware state line. Private vessels also received a description of the "One More" and participated in the search. The results were fruitless (R. 171; 172).

On August 18, 1961, a burned bow section of a boat was recovered 12 miles northeast of the Barnegat Light vessel (R. 172). This section was turned over to the Coast Guard and was examined by Lt. Cmdr. Walter B. Alvey, who determined that it was the bow piece from the "One More" by means of a comparison of New Jersey motor boat registration numbers and the numbers that remained on the recovered section. Confirmation of the identity of the boat was made by Harold Frost, an employee of Michael Simson, who had worked on the boat on many occasions and who was able to identify certain work he had done when he examined the recovered section (R. 173-175).

A written report was prepared by Lt. Cmdr. Alvey for his office, which reflected his conclusion that the recovered section was, in fact, part of the "One More" and, further, that the boat had suffered a fire, the cause of which was unknown, that it had then sunk, and that because of the absence of the persons on board, they must be considered dead (R. 180; 184).

No further trace of the boat or its occupants was ever found.

The action below was commenced by four of the Petitioners by means of a Libel and Complaint (R. 11). An Answer, including a Petition for Limitation of Liability, was filed by the respondent, who further instituted a Petition for Limitation of Liability by separate action (R. 22; 29). Claims were thereafter filed by the four original libellants. In addition, a claim was filed on behalf of the motherof another passenger (R. 46; 47; 49; 50; 51). The two proceedings were thereafter consolidated (R. 54).

Prior to trial of the matter, Letters of Administration were issued to the Petitioners based upon the published opinion of *In Re Bencel's Estate*, 78 N. J. Super. 545, 189 A. 2d 733 (App. Div. 1962).

Trial of the consolidated matters commenced before the Honorable Thomas F. Meaney, U. S. D. J., on December 10, 1963 (R. 67). On March 6, 1964, Findings of Fact and Conclusions of Law were filed, in which the court found as a matter of fact and as a matter of law that negligence had not been established (1a). The judgment of the District Court was appealed and was affirmed by the Court of Appeals for the Third Circuit on March 31, 1965 (10a; 12a).

ARGUMENT

I

The decision below is clearly correct.

Petitioners seek certification of certain questions which they allege are deserving of consideration by this court, concerning the operation of the doctrine of *res ipsa loquitur,* and the coverage of the doctrine of seaworthiness.

These questions were heretofore considered by the District Court and then on appeal by the United States Court of Appeals for the Third Circuit, both of which tribunals found adversely to the Petitioners.

The Petition is essentially a duplicate of Petitioners' Brief filed at the time of appeal. Essentially they pray that upon review of the trial transcript, this court will invoke the doctrine of *res ipsa loquitur* in their favor or, in the alternative, expand the doctrine of seaworthiness so as to include individuals falling within the category of sports fishermen, within which they claim they fall.

The present case is one that can be characterized as unusual or unique, but only in a very limited way. A boat is lost at sea and with it its owner and five passengers. The boat is sound, well equipped and its owner experienced and competent. The weather was good and the seas calm. How did this boat disappear? It is this question, rather than any question of law, that makes one become intrigued with this case and makes it unusual. There are, in addition, of course, natural and automatic considerations of sympathy as would follow from any loss of life. Our law, however, is not grounded nor does it operate upon these factors, but rather in a consistent manner granting, insofar as it can, equal justice to all.

The applicable law in this case has been recognized and applied in numerous cases of varying factual backgrounds many of which present equally intriguing questions of causation and parallel sympathetic features. In all of these cases the law sets a standard of proof to be met. Where it is, a remedy is available, and where it is not, the consequences must be borne as a part of life.

As can be seen from a review of the trial transcript, petitioners' theory of negligence was most tenuous. Basically, it was grounded upon the testimony of their expert Mr. Loeser, the gist of which was that the loss was apparently occasioned by an explosion of accumulated gasoline vapors in the bilge, followed by a fire of severe intensity (R. 250; 251; 256). Further, it was theorized that the vapor accumulation was caused by either (1) an erratic operation of the engines, or (2) operation of one engine with the other engine shut off (R. 257).

In the case of the first alternative, it was theorized that if both engines are operated erratically (which Petitioners apparently equate with slow speed or a speed slower than the crusing speed of the vessel), vapor accumulation results from the fact that "the gasoline from the carburetor to the intake manifold does not remain in suspension but begins to drop out into the intake manifold and that comes back through the air horn in the carburetor and spills over into the bilge" (R. 259).

As regards the second alternative, "when one engine is shut off and the other engine is operating and there is no way to stop the flow of gasoline to the carburetor of the dead engine, there is a pressure on that fuel which floods the carburetor of the dead engine and that spills over into the bilges" (R. 258).

Ignition of the fumes supposedly came about from either (1) a spark from the generator; (2) a spark from the distributor; or (3) the starter (R. 257; 395; 396).

Aside from the fact that these theories were disproven, as demonstrated by the testimony of Mr. Kell and Dr. Surosky in refutation thereof, they were grounded upon pure speculation (R. 316). Mr. Loeser implied this when during the course of cross-examination he admitted he didn't know the speed the boat was being operated at at the time of the occurrence, nor whether the motors were operating erratically, nor whether one motor was on and one motor was off, nor whether, for that matter, the boat was even in motion (R. 271; 279). At no time during the course of his examination did Mr. Loeser specifically state precisely what happened. The sum and substance of his testimony consisted of two theories as to gas vapor accumulation and a mere three sources of ignition from which innumerable possibilities can be postulated.

Lt. Cmdr. Alvey indicated he assumed the fire started in the engine compartment, the probable result of which was an explosion (R. 180; 181). He further indicated, however, the cause of the fire was unknown, that he did not know the proximate cause thereof, and that it was possible the boat suffered an explosion, which could have come about from any number of causes (R. 184; 195). In response to an hypothetical question posed during the course of his cross-examination and based upon the facts developed by examination and cross-examination of Petitioners' other witnesses as to the equipment on the "One More", and its operation and maintenance, he indicated that it was his expert opinion that the same constituted proper procedure (R. 185-196).

How the testimony of these two experts for the Petitioners cannot be said to be clearly grounded on speculation and in part be inconsistent is difficult to determine.

In *Schwecke* v. *U. S.*, 96 F. Supp. 225 (D. C. Cal. 1951), it was held that in a court of first instance, libellants must prove their case by establishing their probabilities, not possibilities. The mere choice of probabilities does not constitute evidence, but creates only conjecture and surmise on which a verdict of a jury cannot stand. *Franklin* v. *Shelly Oil Co.*, 141 F. 2d 568 (10th Cir. 1944); *Caputo* v. *U. S.*, 157 F. Supp. 568 (D. C. N. J. 1958); *Modla* v. *U. S.*, 151 F. Supp. 198 (D. C. N. J. 1957).

Additionally, as will be noted from a review of the trial transcript, respondents were obliged to present testimony in support of their defense as their motion for involuntary dismissal of petitioners' case was denied both at the end of the petitioners' case and at the end of the entire case (R. 291-294; 421; 424). This being the case, it is submitted that the effect of the doctrine of *res ipsa loquitur* was spent. An indication that the concept loses any special evidential effect it may have once a libellant has survived a motion for involuntary dismissal at the end of his case is found in *Geotechnical Corp. of Delaware* v. *Pure Oil Co.*, 196 F. 2d 199, *cert. den.*, 344 U. S. 874, 973 S. C. 165, 175 (1952), an explosion case brought in Admiralty. There the court stated at page 205:

> ". . . But the doctrine [res ipsa loquitur] as expounded by the Supreme Court, and to be applied in admiralty, has less potency than is given it in some other courts. . . . The effect of them is to hold that the doctrine is not a rule of law, but a principle of evidence, useful to aid in making a prima facie case, but that it does not change ultimately the burden of proof on the plaintiff to show negligence in the defendant; and when the evidence is all in, the question still is whether all the evidence, in the light of common experience, reasonably shows that the de-

> fendant was negligent in some respect that caused the injury, though the particular negligence cannot be pointed out or directly proved. (citations omitted)''

From the foregoing it would appear that where, as here, proofs were presented by both parties, any inference that may have initially benefited the Petitioner became one of a number of such inferences to be weighed by the court.

This court's pronouncement in the case of *Sweeney* v. *Irving*, 228 U. S. 233, 240; 33 S. Ct. 416 (1913), has been said to be the most quoted statement of the rule concerning the operation of the doctrine of *res ipsa loquitur*. There it is said:

> ''. . . *res ipsa loquitur* means that the facts of the occurrence warrant *the inference* of negligence, *not that they compel such an inference;* that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, *but it is evidence to be weighed, not necessarily to be accepted as sufficient;* that they call for explanation or rebuttal, *not necessarily that they require it;* that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur*, where it applies does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff.'' (Emphasis added)

Based upon this criterion, ample justification, therefore, existed to support the trial court's determination both as a matter of fact and as a matter of law that *res ipsa loquitur* did not apply.

Turning to the question of the application of the doctrine of unseaworthiness, it is clear that the law as it now exists does not encompass the petitioners' decedents. *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 629, 79 S. Ct. 406 (1959).

Further, there is a complete lack of proof that the decedents were in fact fishing at the time of the loss.

Lastly, it is incumbent upon the petitioners to prove the nature of the unseaworthy condition. In this respect the theories of negligence and unseaworthiness are similar. Again, this they did not do.

II

The questions presented relating to the doctrine of *res ipsa loquitur* are not proper for the purpose of certification as involving mixed questions of fact and law and the burden of proof.

Petitioners initially contend that while they do not essentially take issue with the finding of fact of the trial judge sitting in Admiralty without a jury, that based upon those facts the trial judge should have as a matter of law found in their favor utilizing the permissive inference that may be raised by application of the doctrine of *res ipsa loquitur* or, put in another manner, that their case was so well proven and the resulting inference so strong and pervading that it was essentially mandatory and could only result in the court's returning a verdict in their favor.

Whether or not petitioners *in fact* have accepted the findings of fact of the trial court can be seriously disputed. If they do, then their application to this court is clearly without merit on its face, for this representation indicates their acceptance with the court's findings numbered 8, 9,

10, 11, 18, 22, 24 and 25 (4a; 5a; 6a). These findings essentially indicate that a sound, well equipped seaworthy vessel operated by a competent, experienced owner was lost at sea and that to explain the cause of the loss several possibilities were given, but no general agreement was reached. As these findings obviously support the result, consideration of the Petition should end at this point.

In actuality, petitioners do not substantially accept the trial court's findings. A review of their Statement of Facts and Argument and a comparison of this with the trial court's findings reveal this. They seek to justify this and to justify their contentions on the purely emotional grounds that the sea erases evidence of disasters, and this court should balance the equities and place the burden of proof on the owner of the boat who must assume responsibility for any disasters which ordinarily do not happen in the absence of negligence. They state that the owner is in the best position to assume this obligation (Petitioners' brief, pp. 10, 11).

In essence their argument is one dealing with mixed questions of law and fact and with the weight of the evidence. Traditionally questions of this type have not been certified by this court. *Triplett* v. *Lowell*, 297 U. S. 638, 56 S. Ct. 645 (1935); *Pflueger* v. *Sherman*, 293 U. S. 55, 55 S. Ct. 10 (1934); *State National Bank of Springfield* v. *St. Louis Rail Fastening Co.*, 122 U. S. 21, 7 S. Ct. 1054 (1887).

Further, their argument apparently does not consider that respondent's decedent also was lost at sea and that respondent is, therefore, in no better position than the petitioners to explain this loss. As noted previously, petitioners received the benefit of the doctrine when respondent's motion for involuntary dismissal at the end of the

libellants' case was denied when thereafter the burden of coming forward with the evidence shifted to the respondent, who then produced testimony in support of their case. Having received this benefit they have no basis to now complain.

III

There is no conflict of decisions nor important question of federal law shown in the questions sought to be certified.

Petitioners' brief is devoid of any showing of any true conflict of decisions between the result obtained and the reported decisions of the Federal Courts at any level.

Petitioners have in the questions sought to be certified relied on the cases of *Leathem Smith-Putnam Navigation Co. v. Osby*, 79 F. 2d 280, *cert. den.*, 296 U. S. 653, 56 S. Ct. 370 (1935) and *The Rambler*, 290 F. 791 (2nd Cir. 1923) (Petitioners' brief, pp. 2, 3). Their analysis of the *Rambler* case is such that it clearly distinguishes this case on its face. The cause of the loss, *e.g.*, a boiler explosion, was clearly shown.

In the *Leathem Smith-Putnam* case, which petitioners merely cite without discussion, evidence as to the *cause* of the occurrence was far more readily apparent than in the case *sub judice*. The same holds true for the cases of *The Omar D. Conger*, 1 F. 2d 732 (E. D. Mich. 1924) and *The Columbia*, 25 F. 2d 516, *aff'd per curiam*, 25 F. 2d 518, cert. den., 277 U. S. 595, 48 S. Ct. 530 (1928), cited by the petitioners during the course of their brief (Petitioners' brief, p. 17).

A fairly recent case which bears what is submitted to be the most analagous factual situation is the case of *In Re Binstock,* 213 F. Supp. 909 (D. C. S. D. N. Y. 1963), a case where, incidentally, proctor for the petitioners represented a claimant in that Limitation action. In that case one Milton Binstock was the owner of a 30-foot Owens cabin cruiser which he had purchased in late 1956 or early 1957, and which was named the "Ina B II", which was equipped with twin inboard engines and was new when purchased.

In the late summer of 1958, Binstock commenced negotiations with one Samuel Glassberg for the purposes of selling him the vessel. In September of that year Binstock took Glassberg to Mantoloking, New Jersey, to inspect the vessel, and in October, 1958, Glassberg sought and obtained Binstock's permission to take the boat for a trial run.

On October 26, 1958, Binstock met with Glassberg and with one Murray Friedman, a business acquaintance of Binstock's, Lawrence Glassberg, a son of Samuel Glassberg, and with one Cyril Waldman, and the entire group then went to Mantoloking, New Jersey, where the boat was berthed, and a 45 minute demonstration was given apparently at the dock. The boat was not taken out at that time because of weather conditions. Thereafter the group headed north on the Garden State Parkway, and in view of the fact that it appeared that the weather was breaking, a call was made by Binstock or Glassberg to the Coast Guard and then the group returned to Mantoloking and boarded the boat for the trial run at sea. Lawrence Greenberg, however, did not board the boat, but took his father's car and went from Mantoloking to Manasquan to await the arrival of the boat.

The boat thereafter with the remaining individuals aboard, came from Mantoloking to Manasquan, at which

point Binstock left the boat and the three other men then went to sea for the purpose of traveling to the Bergen Beach Yacht Club in Brooklyn, New York. The boat never arrived.

A Coast Guard search was initiated, and on the day following the boat was located in a semi-sunken condition at a position approximately 3.7 miles from the Shark River Inlet. No one was aboard the boat. Thereafter, Binstock petitioned for Limitation of Liability pursuant to 46 U. S. C., §183, *et seq,* and decedents' representatives filed their claims. In addition, Friedman and Glassberg's representatives later asserted crossclaims against each other at pretrial more than two years after their death, each on the theory that the other was operating the boat and, thus, responsible for the death of the other.

At trial evidence was introduced showing that Glassberg and Friedman were both experienced boatmen, and that on the day in question wind conditions, which at midnight had been very strong, had by 4:00 P.M. diminished to a light breeze. Expert testimony was also presented as to the issue of the propriety of undertaking the voyage from Manasquan Inlet to Brooklyn under the weather conditions then obtaining.

A portion of the transom of the vessel was produced in court, specifically the lowest plank of the transom, which was in the stern of the vessel and which was broken in two sections. It had been removed from the vessel after the vessel had been recovered. Expert testimony was also given on behalf of the claimants to the effect that the split transom plank showed evidence of a crack, into which caulking material had been placed. On behalf of the petitioner Binstock, there was expert testimony to the effect that the crack in the transom plank was placed upon the vessel when it was lifted out of the water subsequent to

the casualty. There was also evidence that the cracked transom plank showed no signs of having been caulked, since there were no marks on the plank. In addition, a chemical analysis of the alleged caulk showed it to be paper.

There was also evidence that the Coast Guard Auxiliary had inspected the vessel and found it to be in a seaworthy condition before the voyage, and that it was equipped with adequate life preservers, a satisfactory bilge pump and a ship to shore radio.

The Court held that the weather conditions existing on the day in question were equally observable by all, and that the decision to undertake the voyage was that of the decedents. The court further indicated that even had the weather conditions been such as to dissuade a reasonably prudent yachtsman from undertaking the voyage, it could not find in favor of the claimants. Due to the fact that the Death on the High Seas Act applied in this instance, the court said that it was incumbent upon the claimants to show that the deaths involved were occasioned as the result of some breach of duty owed by the petitioner to the claimants' decedents. The court indicated that this showing had not been made, as the perils that may have existed were equally apparent to and cognizable by the claimants' decedents. The court states at page 915:

> "Even assuming that the dangers were such as to inhibit a reasonably prudent yachtsman from taking the INA B II out on that date, then it must be observed that the claimants' decedents were under no compulsion to take the trip at all. As was stated in Murphy v. Steeplechase Amusement Co., 250 N. Y. 479, 483, 166 N. E. 173, 174 (1929): 'The timorous may stay at home.' I agree with petition-

> er that in the case at bar Chief Judge Cardozo's observation is just as valid upon salt water as upon dry land."

The court also found that the petitioner had not been negligent in entrusting his vessel to the decedents or in failing to warn the decedents of the existing conditions as to weather. The court therefore granted the Limitation of Liability.

Insofar as the crossclaims by the two decedents against their respective estates were concerned, the court, after noting that these claims would be barred by the Statute of Limitations, indicated that even accepting the contention that the respective parties consented to a determination of their claims and waived the Statute of Limitations by virtue of the fact their attorneys signed the pretrial order that:

> ". . . I find that on the basis of the evidence adduced at the trial the claims must be dismissed for failure of proof. *It would be pure speculation to determine who was at the helm or who was navigating the Ina B II at the time it took on water; in like manner, it is impossible to determine what actually took place aboard the vessel, what proximately caused the tragedy, or which of the parties aboard was responsible therefor.*" (213 F. Supp. 909, 916; emphasis added.)

Turning to the question of the novel nature of the question relating to the doctrine of unseaworthiness, petitioners use this application in part as an attempt to seek the enlargement of the scope of the doctrine of unseaworthiness so as to include gratuitous passengers present on board a private boat for the purpose of engaging in the non-commercial venture of sport fishing and to make the owner, to an extent, an insurer.

Their justification for this is two-fold. First, they infer the magnitude of the loss cries for this extension, for without it, the loss is without a remedy, which is an offense to essential justice. Second, they suggest the appellants were, for all intents and purposes, seamen engaged in a maritime activity and, thus, encompassed by the scope of the concept.

As to their first point, there is no possible justification for the extension of the concept legally, morally, economically or sociologically, nor do the cases cited by the petitioners give any indication of the commencement of a trend that would ultimately lead to the expansion of the concept to the extent sought.

The doctrine of seaworthiness is a concept peculiar to admiralty requiring a ship owner to indemnify a seaman for injuries caused by the unseaworthiness of the vessel or its appurtenant appliances and equipment. *Seas Shipping Co.* v. *Sierocki,* 328 U. S. 85, 66 S. Ct. 872 (1946). Historically, however, as pointed out in the *Seas Shipping Co.* case, the doctrine has encompassed seamen and, since 1946, longshoremen and harbor workers who perform jobs that traditionally in the past were those of seamen. There are cases where interesting distinctions have been drawn, and the doctrine has been held inapplicable. The one reported decision that research has disclosed that most parallels this case is *Kermarec* v. *Compagnie Generale Transatlantique, supra,* where the doctrine was declared not to apply to a guest visiting a seaman on a vessel.

The court's attention is invited to I. Edelman, "Maritime Injury and Death", p. 179 (1960), for other interesting examples where the doctrine was held not to encompass certain workers engaged in activities one would consider to be truly maritime in nature.

Rothman v. *U-Steer-It, Inc.*, 247 F. 2d 803 (5th Cir. 1957), cited by petitioners at page 22 of their brief, dealt not with the doctrine of seaworthiness, but with the validity of contractual terms purporting to limit liability.

In all the remaining cases cited by petitioners, a seaman was involved or one doing the work of a seaman. Proof was present which is not present here as to the actual activity the individual was engaged in at the time of the loss or injury complained of.

Petitioners' argument further assumes that if the doctrine applied, they would have recovered, which is a total misconception of the doctrine, as again the nature of the defect or condition giving rise to the unseaworthy condition must be shown.

As to petitioners' second proposition, they would infer that in actuality there was a consideration of sorts paid for their presence on board, that Joseph Bencel was a customer of Michael Simson and the other decedents were employees of Mr. Bencel, so that the relationship of the parties was colored by economic interests, and that Michael Simson had the men on board in payment or appreciation for business, past or future. Because they expressed the desire to fish for tuna, this is a maritime activity, and they are crewmen. This is most tenuous, to say the least, and it is believed that further discussion of this contention is unnecessary.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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